TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ 1913

No. ~~975~~. 275

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

FILED JUNE 14, 1912.

(23,252)

(23,252)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 677.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 23, 1913.

a Supreme Court of the United States.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Plaintiff in Error,
against
THE UNITED STATES OF AMERICA, Defendant in Error.

Transcript of Record on Writ of Error from Judgment of United States District Court, Western District of New York.

W. S. Jenney, Esq., Attorney for Plaintiff in Error, 90 West Street, New York, N. Y.
John Lord O'Brian, United States Attorney, for Defendant in Error, Buffalo, N. Y.

1 The District Court of the United States for the Western District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

Petition for Writ of Error.

And now comes The Delaware, Lackawanna and Western Railroad Company, Defendant herein, and says:

That on or about the 19th day of March, 1912, the District Court entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this Petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

WILLIAM S. JENNEY,
Attorney for Defendant.

Office and Post Office Address: No. 90 West St., Borough of Manhattan, New York City.

Allowed.
C. M. HOUGH,
Judge of the United States District Court.

(Endorsed:) 821. The United States District Court Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Petition for Writ of Error. Filed Apr. 17, 1912. Sidney W. Petrie, Clerk. Due service of a copy of within Petition for Writ of Error is hereby admitted this 11 day of April, 1912. John Lord O'Brian, United States Attorney.

2 The District Court of the United States for the Western District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.

Order Allowing Writ of Error.

On reading and filing the Petition of The Delaware, Lackawanna and Western Railroad Company praying for the allowance of a Writ of Error, and the Assignment of Errors herein, it is

Ordered, that the Writ of Error be and it hereby is allowed, and that a duly authenticated transcript of the record herein be forthwith transmitted to the Supreme Court of the United States.

Dated, Buffalo, N. Y., April 5, 1912.

C. M. HOUGH,
United States District Judge.

(Endorsed:) 821. The United States District Court Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Order Allowing Writ of Error. William S. Jenney, Attorney for Defendant Office & Post Office Address No. 90 West St., New York City. Due service of a copy of within Order Allowing Writ of Error is hereby admitted this 17th day of April, 1912. John Lord O'Brian United States Attorney. Filed Apr. 17, 1912. Sidney W. Petrie, Clerk.

3 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western District of New York in the Second Circuit, Greeting:

Writ of Error.

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said District Court, before you, between The United States of America, plaintiff, and The Delaware, Lackawanna and Western Railroad Company, defendant, a manifest error has happened to the great damage of the said The Delaware,

Lackawanna and Western Railroad Company, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at the City of
4 Washington, on the fifteenth day of May next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States the 15th day of April, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty-sixth.

S. W. PETRIE,
Clerk of the District Court of the United States
for the Western District of New York.

The foregoing Writ is hereby allowed.
C. M. HOUGH,
United States District Judge.

4½ [Endorsed:] 821. United States District Court, Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Writ of Error. William S. Jenney, Attorney for Defendant. Office & Post Office Address No. 90 West St., New York City. Due service of a copy of within Writ of Error is hereby admitted this 17th day of April, 1912. John Lord O'Brian, United States Attorney. Filed Apr. 17 1912 Sidney W. Petrie, Clerk.

5 Pleas in the District Court of the United States of America in and for the Western District of New York.

At a stated session held at the court-room in the city of Buffalo in the said Western District of New York, on the second Tuesday of March, in the year of our Lord one thousand nine hundred and twelve, before the Honorable Charles M. Hough, judge of the said court, assigned to keep the peace of the said United States of America, in and for the said district, and also to hear and determine divers felonies, misdemeanors, and other offenses against the said United States of America, in the said district committed.

WESTERN DISTRICT OF NEW YORK, *ss.:*

Be it remembered, that on the eighth day of January, 1912, at a stated session of said Court, held at Buffalo, in and for the said District, before the Honorable John R. Hazel, Judge thereof, the Grand

Inquest of the United States, inquiring for the Western District of New York, having been duly summoned, empaneled, charged and sworn, according to law, came into the said Court before the Judge thereof, and brought into, and presented to said Court, a true Bill of Indictment against The Delaware, Lackawanna & Western Railroad Company which was then and there filed in said Court and said Indictment is in these words:

6 District Court of the United States for the Western District of New York.

At a stated term of the District Court of the United States of America in and for the Western District of New York, begun and held at the United States court-rooms in the Federal Building, in the city of Buffalo, within and for the district aforesaid, on the second Tuesday of November, in the year of our Lord one thousand nine hundred and eleven, before Honorable John R. Hazel, judge of said court.

WESTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the District aforesaid, then and there sworn and charged to inquire for the said United States of America and for the body of said District, do, upon their oaths, present that before and on the first day of September, in the year of our Lord one thousand nine hundred and nine, and throughout the period of time from that day until and on the thirty-first day of May, in the year of our Lord one thousand nine hundred and ten, The Delaware, Lackawanna & Western Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and was and is a common carrier engaged in the transportation of property, wholly by railroad, over its railway route, from a point on its route, to wit, Black Rock, in the City of Buffalo, in the State of New York, to another point on its route, to wit, the City of Scranton, in the County of Lackawanna, and State of Pennsylvania, and so during all of said period was a corporation common carrier subject to the provisions of the Act of Congress approved February Fourth, in the year of our Lord one thousand eight hundred and eighty-seven, and entitled "An Act to Regulate
7 Commerce," and also to the Acts of Congress amendatory to the said Act and supplemental thereto.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that during the period of time aforesaid, to wit, on the first day of September in the year of our Lord one thousand nine hundred and nine the said corporation common carrier unlawfully did knowingly and willfully conduct and transport, through the said Western District of New York, and engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manu-

factured products thereof, to wit, 27704 pounds of hay, then and there contained in a car bearing the initials "C. & A." and the number "36892," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting the said article and commodity through the said District, and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, then was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that the said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and willfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

Second Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 5th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and willfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 25925 pounds of hay, then and there contained in a car bearing the initials "B. & M." and the number "92462," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and

in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

10 Third Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 11th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 25950 pounds of hay, then and there contained in a car bearing the initials "T. & O. C." and the number "12320," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and the[illegible] the owner; contrary to the form of the statute of the United Sta[illegible] of America in such case made and provided, and against the p[illegible]ace and dignity of the said United States of America.

11 Fourth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 12th day of September in the year of our

Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 24090 pounds of hay, then and there contained in a car bearing the initials "B. & M." and the number "65089," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

12

Fifth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 13th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 18890 pounds of hay, then and there contained in a car bearing the initials "L. S. & M. S." and the number "45067," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and

commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

13

Sixth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 14th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 19025 pounds of hay, then and there contained in a car bearing the initials "N. Y. C. & H." and the number "12112," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

14

Seventh Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 12th day of November in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 25725 pounds of hay, then and there contained in a car bearing the initials "M. C." and the number "46193," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

15

Eighth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 8th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Inter-state Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured

products thereof, to wit, one carload containing 18586 pounds hay, then and there contained in a car bearing the initia "L. V." and the number "69949," consigned by the said T Delaware, Lackawanna & Western Railroad Company to itself the said City of Scranton, when, as the said common carrier at t time of so conducting and transporting said article and commodi through the said District and engaging in the transportation there in Interstate Commerce, as aforesaid, well knew the said article an commodity then was one of which it was the sole owner, and o which, as it then and there well knew, was not necessary or i tended for its use there or elsewhere in the conduct of its busine as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesai do say, that said The Delaware, Lackawanna & Western Railroa Company, common carrier as aforesaid, at the time and place an in manner and form aforesaid, unlawfully did knowingly and wi fully conduct and transport an article and commodity from on State of the United States to another State of the United State of which it was then and there the owner; contrary to the form o the statute of the United States of America in such case made an provided, and against the peace and dignity of the said Unite States of America.

16 Ninth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, d further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indict ment set forth, within the period of time in that Count mentioned to wit, on or about the 16th day of October in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 22590 pounds of hay, then and there contained in a car bearing the initials "C. & O." and the number "7322," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and

in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

17

Tenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 22nd day of October in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 21470 pounds of hay, then and there contained in a car bearing the initials "L. V." and the number "69653," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

18

Eleventh Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 27th day of October in the year of our

Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 24800 pounds of hay, then and there contained in a car bearing the initials "B & O," and the number "166131," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

19 Twelfth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 29th day of October in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 25178 pounds of hay, then and there contained in a car bearing the initials "G. T." and the number "10985," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and

commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, further present that the said Delaware, Lackawanna & Western Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

20

Thirteenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 28th day of November in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 19488 pounds of hay, then and there contained in a car bearing the initials "C. I." and the number "3226," consigned by the said Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

21

Fourteenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 25th day of November in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 24475 pounds of hay, then and there contained in a car bearing the initials "C. G. W." and the number "14652," consigned by the said Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

22

Fifteenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 4th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 27020 pounds of

bay, then and there contained in a car bearing the initials "P. M." and the number "8180," consigned by the said Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

23

Sixteenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said The Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 9th day of September in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 22665 pounds of hay, then and there contained in a car bearing the initials "P. M." and the number "42458," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wil-

fully conduct and transport an article and commodity fro
State of the United States to another State of the United
of which it was then and there the owner; contrary to the f
the statute of the United States of America in such case ma
provided, and against the peace and dignity of the said
States of America.

21 Seventeenth Count.

And the Grand Jurors aforesaid, upon their oaths afores
further present that the said The Delaware, Lackawanna & W
Railroad Company, corporation as in the first Count of this
ment set forth, within the period of time in that Count ment
to wit, on or about the 1st day of October in the year
Lord one thousand nine hundred and nine unlawfully did
ingly and wilfully conduct and transport, under the circums
and conditions described in the said First Count, through th
Western District of New York, and did engage in the transpo
thereof in Interstate Commerce, to wit, from Black Rock af
to Scranton aforesaid, over its said route, a large quantity of
tain article and commodity other than timber and the manufa
products thereof, to wit, one carload containing 26300 pou
hay, then and there contained in a car bearing the
"P. M." and the number "32989," consigned by the said
Delaware, Lackawanna & Western Railroad Company to its
the said City of Scranton, when, as the said common carrier
time of so conducting and transporting said article and comm
through the said District and engaging in the transportation t
in Interstate Commerce, as aforesaid, well knew the said articl
commodity then was one of which it was the sole owner, an
which, as it then and there well knew, was not necessary
tended for its use there or elsewhere in the conduct of its bu
as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths afor
do say, that said The Delaware, Lackawanna & Western Rai
Company, common carrier as aforesaid, at the time and place
in manner and form aforesaid, unlawfully did knowingly and
fully conduct and transport an article and commodity from
State of the United States to another State of the United S
of which it was then and there the owner; contrary to the for
the statute of the United States of America in such case made
provided, and against the peace and dignity of the said U
States of America.

25 Eighteenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid
further present that the said The Delaware, Lackawanna & We
Railroad Company, corporation as in the first Count of this in
ment set forth, within the period of time in that Count mentio
to wit, on or about the 5th day of October in the year of
Lord one thousand nine hundred and nine unlawfully did k

ingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 29888 pounds of hay, then and there contained in a car bearing the initials "P. M." and the number "52395," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one which, as it then and there well knew, was not necessary or intended for its use there or elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say, that said The Delaware, Lackawanna & Western Railroad Company, common carrier as aforesaid, at the time and place and in manner and form aforesaid, unlawfully did knowingly and wilfully conduct and transport an article and commodity from one State of the United States to another State of the United States, of which it was then and there the owner; contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States of America.

26

Nineteenth Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said Delaware, Lackawanna & Western Railroad Company, corporation as in the first Count of this indictment set forth, within the period of time in that Count mentioned, to wit, on or about the 15th day of November in the year of our Lord one thousand nine hundred and nine unlawfully did knowingly and wilfully conduct and transport, under the circumstances and conditions described in the said First Count, through the said Western District of New York, and did engage in the transportation thereof in Interstate Commerce, to wit, from Black Rock aforesaid to Scranton aforesaid, over its said route, a large quantity of a certain article and commodity other than timber and the manufactured products thereof, to wit, one carload containing 26755 pounds of hay, then and there contained in a car bearing the initials "D. L. & W." and the number "33255," consigned by the said The Delaware, Lackawanna & Western Railroad Company to itself at the said City of Scranton, when, as the said common carrier at the time of so conducting and transporting said article and commodity through the said District and engaging in the transportation thereof in Interstate Commerce, as aforesaid, well knew the said article and commodity then was one of which it was the sole owner, and one

which, as it then and there well knew, was not necessary
tended for its use there or elsewhere in the conduct of its
as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths afo
do say, that said The Delaware, Lackawanna & Western R
Company, common carrier as aforesaid, at the time and pla
in manner and form aforesaid, unlawfully did knowingly a
fully conduct and transport an article and commodity fr
State of the United States to another State of the United
of which it was then and there the owner, contrary to the
the statute of the United States of America in such case ma
provided, and against the peace and dignity of the said
States of America.

27 Twentieth Count.

And the Grand Jurors aforesaid, upon their oaths afore
further present that the said The Delaware, Lackawanna & W
Railroad Company, corporation as in the first Count of this
mentioned set forth, within the period of time in that Count mentio
wit, on or about the 13th day of November in the year of ou
one thousand nine hundred and nine unlawfully did knowing
wilfully conduct and transport, under the circumstances an
attitude described in the said First Count, through the said W
District of New York, and did engage in the transportation
in Interstate Commerce, to wit, from Black Rock aforesaid to
City aforesaid, over its said route, a large quantity of a certain
and commodity other than timber and the manufactured p
thereof, to wit, one carload containing 25280 pounds of bar
and there contained in a car bearing the initials "P. M."
number "12308," consigned by the said Delaware, Lackawa
Western Railroad Company to itself at the said City of Sc
when, as the said common carrier at the time of so conducti
transporting said article and commodity through the said
and engaging in the transportation thereof in Interstate Com
as aforesaid, well knew the said article and commodity then w
of which it was the sole owner, and one which, as it then and
well knew, was not necessary or intended for its use there
elsewhere in the conduct of its business as a common carrier.

And so the Grand Jurors aforesaid, upon their oaths afo
do say, that said Delaware, Lackawanna & Western Railroa
pany, common carrier as aforesaid, at the time and place
manner and form aforesaid, unlawfully did knowingly and w
conduct and transport an article and commodity from one S
the United States to another State of the United States, o
it was then and there the owner; contrary to the form of the
of the United States of America in such case made and pro
and against the peace and dignity of the said United Sta
America.

JOHN LORD O'BRIAN,
Attorney of the United States in and for the
Western District of New Y

(Endorsed:) 821 United States District Court Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Indictment for transporting in interstate commerce a commodity which it owned in violation of Sec. 1, Act of Feb. 4, 1887, as amended by Act of June 29, 1906. John Lord O'Brian, Attorney for the United States. A True Bill. W. R. Demarest, Foreman. Filed in open court Jan. 8, 1912. Sidney W. Petrie, Clerk. Feby 1, 1912, the defendant arraigned and pleads not guilty with leave to withdraw &c. Mch 18, 19, 1912, the defendant tried and verdict of guilty rendered.

28 And thereupon John Lord O'Brian, Esq., the Attorney of the United States for the said District, prayed the process of the said District Court for the arrest of the said The Delaware, Lackawanna & Western Railroad Company, defendant, and it was granted; and on the first day of February in the year of our Lord one thousand nine hundred and twelve of the term of November at the city of Buffalo came the Marshal of the United States for the Western District of New York, and brought into the said District Court the body of the said defendant, upon the said process, and the said defendant being duly arraigned upon the said Indictment, in open Court, and called upon to plead thereto, pleaded that it was not guilty of the offenses charged therein, in manner and form as the same are therein set forth, and of this it put *himself* upon the country, with leave to withdraw its said plea and to interpose demurrer thereto and said United States of America did the like.

Wherefore, let a jury be summoned, empanelled and sworn to try the said issue at the March term of said Court, in the year of our Lord one thousand nine hundred and twelve at the city of Buffalo in the said district.

And now on the 18th day of March of the term of March one thousand nine hundred and twelve aforesaid, come as well the Attorney of the United States for the said District, as the said defendant, who now elects to stand on its said plea of not guilty as heretofore entered; and issue also the jurors aforesaid, to-wit: Herman R. Bischwald, Charles T. Starnes, George Bingham, Gilbert N. Smith, Warner V. Clark, Jesse A. Cairns, Fred'k W. Wagner, John E. Mullen, Henry F. Bickert, James Upton, George H. Sertell, Leonard Pettey, and they on the 19th day of March, 1912, of the term of March, 1912, the said Jurors to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths say, that the said defendant The Delaware, Lackawanna and Western Railroad Company is guilty of the offenses charged in all the Counts of the said Indictment in manner and form as the same are therein set forth.

And thereupon the said defendant, being present in open Court, and having heard the said verdict, is inquired of by the Court if it have anything to say why the judgment of the law should not be pronounced upon it according to the said verdict, and no sufficient answer being given, His Honor, the Judge of the said Court, in the presence of the said defendant, does here adjudge and sentence that

the said defendant for the said offenses of which it stands convicted as aforesaid, *to* pay a fine of one hundred dollars on each of said twenty counts contained in said indictment, making a total of two thousand dollars.

S. W. PETRIE, *Clerk.*

(Endorsed: Docket No. 821. District Court of the United States, Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Record of Conviction. March Term, 1912. Filed Mar. 20 1912. S. W. Petrie, Clerk.

29 The District Court of the United States for the Western District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.

1912.
February 1st. Defendant arraigned and pleaded not guilty.
March 18th. Trial begun, and case submitted to Jury.
March 19th. Jury returns verdict of guilty on all twenty (20) counts of Indictment.

Thereupon, the Court now here on motion of John Lord O'Brian Esquire, United States Attorney, doth adjudge and sentence the said The Delaware, Lackawanna & Western Railroad Company to pay a fine of $100 on each count of the indictment, making a total of $2,000.

The Court orders that execution be stayed on the judgment herein for 60 days and that for the purpose of allowing the defendants to make and have signed a Bill of Exceptions, this term of court is extended for two months from the time, when this said term shall in due course, adjourned.

An extract from the minutes.

S. W. PETRIE.

30 The District Court of the United States for the Western District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.

Bill of Exceptions.

The issues in this action came on for trial at a Stated Term of the Court, held in the City of Buffalo, within and for the Western Dis-

rict of New York, on the 18th day of March, 1912, before the Hon-
rable Charles M. Hough, District Judge. The Government ap-
eared by John Lord O'Brian, Esq., United States Attorney. The
efendant appeared by Charles R. Sears and William S. Jenney.

Before the jury was impanelled, the defendant, being interro-
ated by the Court, stated that its plea of not guilty made on Febru-
ry 14, 1912, stood.

A jury having been impanelled, the following proceedings were
had and testimony taken:

Mr. O'Brian opened the case to the jury on behalf of the Government.

A contract between the Vassar Hay and Produce Company and
he Delaware, Lackawanna and Western Railroad Company was re-
ived in evidence without objection and marked "Exhibit 1."

It was admitted by Counsel for defendant that all of the hay men-
ioned in the twenty counts of the Indictment was purchased by the
efendant pursuant to the contract marked "Exhibit 1."

It was admitted by Counsel for defendant that the several ship-
ents of hay mentioned in the twenty counts of the Indictment
ere paid for by the defendant with its checks, pursuant to said
ontract.

One of said checks, as being representative of all of them, and the
older on which said check was made out, as being representative
f all of the vouchers covering payments for all hay referred to in
ach of the twenty counts of the Indictment, were received in evi-
ence without objection and marked "Exhibit 2" and further pro-
ession of evidence as to payments made by the defendant for all
f mentioned in each of the twenty counts in the Indictment was
reed to by counsel for the defendant.

WILLIAM SAXBY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. O'BRIAN:

I am an employee of the Lackawanna Railroad, as freight agent at
lack Rock, and was from September to December, inclusive, 1909,
nd shipments of hay arriving at Black Rock pursuant to a con-
act between the Vassar Hay and Produce Company and The Dela-
are, Lackawanna and Western Railroad Company. I was given in-
tructions by the Purchasing Agent of the Railroad Company,
Mr. F. Wilson, as to what I should do in my capacity as freight
gent in respect to that hay. Those instructions were given in the
orm of a letter, copy of which I now identify.

Copy of this letter received in evidence without objection and
marked "Exhibit 4."

I carried out these orders. The freight was shipped from the
oint of origin, Vassar and vicinity to Buffalo, under a local rate.
When the freight reached Buffalo we split up the rate and sent it
through with a through rate; that is, we protected the rate on the

Pursuant to the instructions in that letter, I reconsigned the hay from Black Rock to The Delaware, Lackawanna and Western Railroad Company, care R. A. Phillips, Scranton, and the shipments en route were on way bills similar to and including the one which I now identify, all of which way bills were made out in my office.

Way Bill, identified by witness, received in evidence without objection and marked "Exhibit 3".

33 The marks on that way-bill have the following meaning: The words "Marks, consignee and destination, D. L. & W. Ry., care R. A. Phillips, Scranton, Pa.", represent the consignee of the hay at Scranton. The *figures* "S. L. & C." mean "shipper's load and count". The initials at the bottom "M. C. 51, 5%" represent "the proportion the Michigan Central got; the proportion of the rate; that is on the division of the rate". The weight was twenty thousand (20,000) pounds. The car number was "62462, B. & M." The figures under the heading "Rate and Authority" represent the rate. They mean that the Lackawanna Railroad gets 12.367% as its proportion; the Michigan Central 13.133 as its proportion; the through rate used was 25½. The number $26.27 is the amount we paid the Michigan Central. That amount was paid to the Michigan Central in weekly settlement by voucher signed by me in the name of the Lackawanna Railroad. The words "Free Company Use" mean that we transported the hay free from Black Rock to Scranton on account of it being Company freight.

JOHN E. CARNEY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. O'BRIAN:

I am and was in 1909 an employé of the Michigan Central Railroad Company.

Way-Bill produced by the witness is received in evidence without objection and marked "Exhibit 5".

The initials under the heading "Consignor" usually represent the name of the consignor. The figures in the next column
34 represent the consignee. That is and was at the time of these shipments the customary way of filling out way bills to show the consignor and consignee.

REESE A. PHILLIPS, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. O'BRIAN:

I am General Manager of the Coal Mining Department of The Delaware, Lackawanna and Western Railroad Company, the Department that has charge of its coal mining operations, and was such General Manager during the period from September to December, inclusive, 1909. During that period the customary course of pro-

cedure in our Department in the handling of hay on its receipt from outside points was as follows:

The hay would arrive at Scranton and would then be consigned to the mines where we desired to use it, by a clerk in my office. The hay was then switched to the mine, and there inspected and weighed, generally by the barn boss, sometimes the outside foreman, someone that was competent to do that work, such men being employés of the Railroad Company. The paper which I now identify is an Inspection Report.

The Inspection Report is received in evidence without objection and marked "Exhibit 6".

That Inspection Report is addressed to C. M. Smith, Tie and Timber Agent of The Delaware, Lackawanna and Western Railroad Company, an assistant to the Purchasing Agent, having an office at Scranton. It was customary in the ordinary course of business to forward the Inspection Report to him. We have an inspection Report for every car. This one is signed by Henry Gise, who was assistant outside foreman of the Bellevue Mine at that time. His duty as inspector at that time was to inspect the quality of the hay and also inspect it as to the weight. It was the customary procedure to put at the top of the Inspection Report the number of the car, the name of the inspector, and the mine for which it was destined. When that Inspection Report reaches the office it is checked with the invoice by the invoice clerk.

This hay was used for feeding the mules and horses in connection with the operation of the collieries of the Coal Mining Department. A Colliery consists of the mine and the outside operation. These mules were used in the underground work and the horses on the outside, team work, etc. All the hay referred to in this contract was so used, in the following mines which were owned and operated by The Delaware, Lackawanna and Western Railroad Company, namely: Hyde Park, Bellevue, Avondale, Taylor, Storrs, Woodward, Archbald, Hallstead, Brisbin, Bliss, Manville and Cayuga.

Of the coal which is mined at these particular mines, a large proportion is used in connection with the operating of the railroad and operating the mines. The remainder is sold in general commercial intercourse to the Coal Company, and eventually goes into the ordinary uses of commerce. The greater part is not used in operating the railroad; the greater part goes into the ordinary uses of commerce eventually.

Cross-examination by Mr. JENNEY:

Copies of the inspector's reports of the inspection of this hay were sent to the auditing department of the Railroad Company as a basis for the preparation of vouchers on which the hay was paid for, that is to say, in order that the bills might be made from the invoice in connection with the inspection report. That was the regular course of business on all commodities.

In the ascertained mining of coal, prepared sizes and steam sizes of coal are mined. The coal which is used by the Lackawanna Rail-

coal Company is almost exclusively steam size. Steam sizes are commercially of less value than prepared sizes, about a third or much. If all the coal in the mines were broken up into steam sizes and none of it prepared in the large sizes, there would be a very large economic waste. All of the steam sizes of coal mined by the Company in the future from year to year is used by the Company. Anywhere from 20 to 25 per cent of the total output is used by the company.

Redirect examination by Mr. O'Brien.

Twenty-five per cent of the total output is steam size and all of that is used by the Company. That is generally the case. In other words, our prepared sizes are the by products.

Prepared sizes consist of stove, egg, and chestnut coal. What is left over after we have taken out the prepared sizes are the steam sizes, but steam sizes are also prepared. I mean by having the dust, dirt and impurities removed. They are called steam sizes because they are universally used for generating steam, more commonly for steam purposes, whereas prepared sizes are used for domestic purposes. The prepared sizes are the most expensive. But if a given output of coal, that is, suppose we had 10,000 tons within a given time out of a given colliery, we could get a certain amount of prepared sizes and all the rest would be steam sizes. In other words, if we were operating a colliery, to get sizes to operate our railroad or mining operation, it would not be economical to break down all our prepared sizes to make it into steam sizes. If we have out of a given anthracite coal mine 10,000 tons we can get from 70 to 75% of prepared sizes and the other 25 to 30 per cent will be steam size. The steam sizes from these collieries which I have mentioned are used by the Lackawanna Rail. in the operation of its railroad, in other words, between 20 and 30 per cent of the output is used by the local road in running the railroad and running the mines as well, and the rest of it is sold to the coal company. The net result is that in order to run the collieries economically and get the best out of them, out of every hundred tons mined the Company will use from 25 to 30 per cent in steam sizes and the rest is for sale.

It was admitted by Counsel for defendant that the lots mentioned in the Indictment went from Black Rock, in the City of Buffalo to Scranton over the line of The Delaware, Lackawanna and Western Railroad Company, no freight rate was charged to or paid to the railroad company at any time for the carriage of the lots described in the twenty counts of the Indictment from Black Rock to destination.

Mr. O'Brien. If the Court please, the proof which we have offered relates to the second count of the Indictment only, and Mr. Sears has consented that so far as that proof shows the transportation of the commodity, the purchase by the defendant and defendant's payment therefor, it may be taken as applying to the method of transporting all the lots mentioned in the Indictment, and the production of further evidence upon these points relating to the remaining counts of the Indictment is waived by the defendant.

Mr. Sears. Yes, that is correct.

The Government rests.

Mr. Sears. If your Honor please, the defendant moves for a dismissal of the Indictment and a direction of a verdict of "not guilty" upon the ground that the facts proved do not constitute a violation of the statute upon which the Indictment is based, namely, the fifth paragraph of the first section of the "Act to Regulate Commerce", approved February 4th, 1887, as said section was amended by an Act of Congress approved June 29th, 1906, which said paragraph is commonly known as the "Commodities Clause", or any statute of the United States, because

First. It appears as a matter of law that the hay mentioned in the Indictment was not owned by the defendant during the transportation thereof over its railroad between Black Rock and Scranton as set forth in the Indictment.

Second. It appears conclusively as a matter of law and fact that the hay mentioned in the Indictment during the transportation thereof by the defendant over its railroad between Black Rock and Scranton as set forth in the Indictment, was necessary and intended for the use of the defendant in the conduct of its business as a common carrier, and that the said hay was in fact used by the defendant in the conduct of its business as a common carrier.

Third. The said statute known as the "Commodities Clause" was not intended to prohibit, and does not prohibit the railroad company from transporting over its railroad, in interstate commerce, as herein lawfully acquired, owned and operated by it, property lawfully purchased and acquired by it and owned by it during such transportation and which is necessary and intended for its use and is used by it in the operation of such railroad for the purpose of enabling coal to be used by it at such mines, and therefore did not prohibit the defendant from transporting the hay mentioned in the Indictment from Black Rock to Scranton as set forth in the Indictment.

by it and owned by it during such transportation, and which is necessary and intended for its use, and is used by it in the operation of such mines for the purpose of producing coal to be sold by it at such mines, is unconstitutional and invalid because:

First. It deprives such railroad company of its liberty and property without due process of law, and takes from it private property without just compensation, contrary to the Fifth Amendment to the Constitution of the United States.

Second. It imposes by section 10 of the statute of which it is a part, excessive fines in violation of the Eighth Amendment of the Constitution of the United States; and by reason of such excessive fines for each violation of said statute, naturally and necessarily operates, and must be construed as having been intended to operate to deter a railroad company from contesting the validity of the statute, thereby depriving such railroad company of liberty and property without due process of law, and denying it the equal protection of the law.

Third. It is not a regulation of Interstate Commerce within the meaning and intent of the Commerce Clause of the Constitution of the United States, but is an absolute prohibition of the transportation of property in interstate commerce, which prohibition was not made for any purpose within any power in that behalf possessed by Congress under the Commerce Clause of the Constitution.

We further move for a dismissal of the Indictment and a direction of a verdict of "not guilty" upon the ground that the said Statute known as the "Commodities Clause," in so far as it undertakes to prohibit this railroad company from transporting over its railroad in interstate commerce to mines lawfully acquired, owned and operated by it, property lawfully purchased and acquired by it and owned by it during such transportation, and which is necessary and intended for its use and is used by it in the operation of such mines for the purpose of producing coal for the use of the railroad and for sale in the manner disclosed by the evidence in this case, is unconstitutional and invalid for the reasons which have just been expressly stated.

The COURT: The motions of the defendant are denied and an exception granted.

Mr. Sears opened for the defendant. The following facts were admitted by Counsel for the Government:

The defendant is a corporation, duly organized and incorporated under and by virtue of the Laws of the State of Pennsylvania.

The defendant now owns, and for many years last past and since long prior to June 29th, 1906, has owned lines of railroad in the State of Pennsylvania extending from the center of the Delaware River at the boundary line of the State of New Jersey, in a northwesterly direction, across the State of Pennsylvania, to the boundary line between the State of Pennsylvania and the State of New York, with a branch line of railroad extending from Scranton, in the State of Pennsylvania, to Northumberland, in the State of Pennsylvania. That all the lines of railroad owned by it are wholly within the State of Pennsylvania.

42 Defendant, as lessee, also now operates and for many years last past and since long prior to June 29th, 1906, has operated various lines of railroad in the States of New Jersey and New York, including the following: The New York, Lackawanna and Western Railway, extending from Binghamton to Buffalo, in the State of New York; the Cayuga & Susquehanna Railroad, extending from Oswego to Ithaca, in the State of New York; the Oswego and Syracuse Railroad, extending from Syracuse to Oswego, in the State of New York; the Greene Railroad and the Utica, Chenango and Susquehanna Valley Railway, which, together, extend from Chenango Forks to Utica and Richfield Springs, in the State of New York; the Valley Railroad, extending from the New York State line at the terminus of defendant's railroad to Binghamton, in the State of New York; the Morris and Essex Railroad, extending from Phillipsburg, in the State of New Jersey, to Hoboken, in the State of New Jersey, the Warren Railroad, extending from the center of the Delaware River, at the southeasterly terminus of defendant's railroad, to Hampton Junction, in the State of New Jersey; together with other branch lines in the States of New York and New Jersey.

Defendant is and for many years last past and since long prior to June 29th, 1906, has been engaged as common carrier in the transportation of passengers and freight in interstate commerce, over the railroads so owned, leased and operated by it, to and from the City of New York, and to and from Hoboken, in the State of New Jersey, through the States of New Jersey, Pennsylvania and New
43 York, to and from Buffalo, Oswego and Utica, in the State of New York, and intermediate points upon the lines of the railroads hereinbefore set forth.

Defendant now owns and for many years last past and since long prior to June 29th, 1906, has owned extensive tracts of coal lands in the State of Pennsylvania, and likewise leases and has leased large tracts of coal lands in the State of Pennsylvania, and is now engaged, and for many years last past and since long prior to June 29th, 1906, has been engaged, in mining coal from the lands so owned and leased by it.

Defendant has acquired said coal lands, owned or leased, and operated by it, under and pursuant to the following Acts of the Legislature of the State of Pennsylvania and in the following manner:

An Act of the General Assembly of the State of Pennsylvania was duly passed and approved by the Governor April 7, 1832, providing for the incorporation of the Ligett's Gap Railroad Company, and authorizing said company, when incorporated, to construct a railroad from a point in Cobb's Gap, near Scranton, in the State of Pennsylvania "to a point on the New York State Line in Susquehanna County, passing through the coal region on the Lackawanna and Ligett's Gap."

Pursuant to the provisions of such Act, the Ligett's Gap Railroad Company was duly incorporated, and by its charter, duly issued under the seal of the Commonwealth of Pennsylvania, March 19,

1849, it was created a corporation and vested with certain
11 rights, powers and privileges.

By a further Act of the General Assembly of the State of Pennsylvania, duly passed and approved by the Governor April 11, 1851, certain additional rights, powers and privileges were conferred upon said Liggett's Gap Railroad Company. Section 1 thereof provides:

"That it shall and may be lawful for the said company to purchase and hold a reasonable amount of coal land. Provided, that the amount so held shall in no case exceed 1,000 acres."

By the same Act the name of the Liggett's Gap Railroad Company was changed to "The Lackawanna and Western Railroad Company." Section 3 thereof provided:

"* * * By and under which name, style and title the said company shall use, exercise and possess all the rights, privileges, powers and franchises to which they are now by law entitled * * * the property and franchises of said company hereby merging and vesting by virtue of this Act, in the name, designation and style of 'The Lackawanna and Western Railroad Company.'"

An Act of the General Assembly of the State of Pennsylvania was duly passed and approved by the Governor April 7, 1849, providing for the incorporation of The Delaware and Cobb's Gap Railroad Company, and authorizing such company, when incorporated, to construct a railroad beginning at the river Delaware at or near the Delaware Water Gap, and thence by a practicable route, terminating at or near Cobb's Gap, in the County of Luzerne or Wayne. Said company was duly incorporated and its charter issued under the seal of the Commonwealth, December 1, 1850. By Act of the General Assembly of the State of Pennsylvania, duly approved April 12, 1851, and April 23, 1852, said company was granted by the State of Pennsylvania certain additional rights, powers and privileges.

An Act of the General Assembly of the State of Pennsyl-
15 vania was duly passed and approved by the Governor March
11, 1853, providing for the consolidation of the above-said Lackawanna and Western Railroad Company and the Delaware and Cobb's Gap Railroad Company. By Section 1 of said Act it was provided:

"That all and singular the property and corporate powers, rights and privileges of both companies be consolidated and united under said merger, except so much of said powers, rights and privileges as conflict, in which case the conflicting portions of the Act incorporating the Delaware and Cobb's Gap Railroad Company, and its several supplements, are hereby repealed, and all provisions of law relative to the Lackawanna and Western Railroad Company not hereinafter altered or supplied shall remain in full force, and so that by virtue of said merger of said companies and the provisions hereof, said Lackawanna and Western Railroad Company may make and construct a continuous line of railroads from Great Bend to the Delaware River, without necessity for transshipment."

By Section 3 of said Act the corporate name of the Lackawanna

and Western Railroad Company, was changed to The Delaware, Lackawanna and Western Railroad Company.

Pursuant to the terms of the aforesaid grants, and prior to the year 1855, defendant duly constructed its railroad as aforesaid from the Delaware River on the boundary line of the State of New Jersey, in a northwesterly direction, through the State of Pennsylvania to the boundary line of the State of New York near Great Bend, Pennsylvania, and it has been engaged in the operation of said railroad continuously since its construction as aforesaid.

The Lackawanna and Bloomsburg Railroad Company was duly incorporated under an Act of the General Assembly of the State of Pennsylvania duly approved April 5, 1852, and was granted various rights, powers and privileges by Acts of the General Assembly of the State of Pennsylvania, duly passed and approved February 19, 1849, March 3, 1853, and April 5, 1855. Under said Acts said company was duly authorized to construct and operate a railroad from the City of Scranton to the City of Northumberland in the State of Pennsylvania. Said railroad was duly constructed during the years 1852 and 1856, and pursuant to an Act of the General Assembly of the State of Pennsylvania, duly passed and approved by the Governor May 16, 1861, entitled "An Act Relating to Railroad Companies," it was by a joint agreement dated June 15, 1873, consolidated and merged into the defendant, The Delaware, Lackawanna and Western Railroad Company. By virtue of the said Act of the General Assembly and the said merger, the defendant acquired all the rights, powers, privileges, franchises and property conferred upon or vested in or which belonged to the Lackawanna and Bloomsburg Railroad Company aforesaid.

By an Act of the General Assembly of the State of Pennsylvania, duly passed and approved April 10, 1856, the Northwestern Coal and Iron Company was duly incorporated. By Section 1 of said Act said company was vested by the General Assembly of the State of Pennsylvania with the power:

To take and hold land and real estate in fee and in fee simple in Butler County and in Armstrong County, and to mine, prepare for market, sell and dispose of the cannel and bituminous coal, iron ore, fireclay, and other minerals on their lands, and to manufacture [illegible] the products of their minerals or lands, and to convey [illegible] or the products thereof to market, with power [illegible] said lands or any portion thereof: Provided [illegible] vested in said company shall not at [illegible] United States [illegible].

By Section [illegible] said company was authorized to [illegible] of branch railroads not exceeding [illegible] length.

[illegible] Act of the General Assembly of the State of Pennsylvania [illegible] passed and approved April 10, 1856, the name of said Northwestern Coal and Iron Company was changed to the [illegible] Coal and [illegible] Company, which said company was by an Act of the General Assembly of the State of Pennsylvania duly passed and approved [illegible] rights, powers and privileges, including the [illegible] as provided in the original Act,

in the County of Luzerne, State of Pennsylvania, and by said act the name of said company was changed to the Continental Coal Company.

By an Act of the General Assembly of the State of Pennsylvania duly passed and approved March 13, 1865, the corporate name of the Continental Coal Company was changed to the Keyser Valley Railroad Company, and said Keyser Valley Railroad Company was by said Act duly granted certain powers, rights and privileges, including the right to use, exercise and possess all the property, rights, privileges, powers and franchises theretofore granted to it, and granted by the General Laws of the Commonwealth to railroad companies. On November 9, 1865, the said Keyser Valley Railroad Company was pursuant to the provisions of the Act of May 16, 1861, hereinafter set forth, duly merged into the defendant, The Delaware, Lackawanna and Western Railroad Company, and the defendant then became lawfully vested with all the rights, powers and property of both companies.

18 The Scranton Coal Company was incorporated in the State of Pennsylvania, October 15, 1854, pursuant to the provisions of an Act of the General Assembly of said State, duly passed and approved April 7, 1849, entitled "An Act to Encourage Manufacturing Operations in this Commonwealth" and the supplements thereto. In its articles of incorporation it is certified, "That the objects for which said com- has been formed are the mining of coal and preparing for market the produce of their mines and vending the same." Pursuant to the provisions of the Act of April 7, 1849, said company was duly authorized to purchase, hold and convey any real or personal estate whatever, necessary or convenient to enable the said company to carry on the business or operations named in said certificate, not exceeding 2,000 acres.

By an Act of the General Assembly of the State of Pennsylvania duly passed and approved April 11, 1867, the said Scranton Coal Company was consolidated with the Steuben Coal Company, and said Steuben Coal Company was granted certain rights, powers and privileges, including the right to hold, possess, use and enjoy all the property of the said Scranton Coal Company, and the rights, privileges and franchises granted to it.

The said Steuben Coal Company was duly incorporated under an Act of the General Assembly of the State of Pennsylvania duly approved May 18, 1865, by which it was granted certain rights, by Section 4 thereof, to:

"Purchase, lease and hold coal and other lands in the County of Luzerne, not exceeding at any one time 3,000 acres, with
49 power to mortgage, sell, lease or otherwise dispose of the same or any part thereof; and the capital of the said company may be employed in purchasing, mining, vending and transporting to market coal and other minerals."

By Section 7 of said Act the said company was duly authorized to maintain an office for the sale of coal and the transaction of other business either in the City of Philadelphia, Pa., or in the City of New York, N. Y.

The Granby Coal Company was duly incorporated under and by

virtue of an Act of the General Assembly of the State of Pennsylvania, duly passed and approved April 15, 1867, by which it was granted certain rights, powers and privileges, including the right to purchase, lease and hold coal lands in the County of Luzerne, not exceeding at one time 5,000 acres, with power to sell the same and to use the capital of said company in purchasing, mining, vending and transporting to market, coal and other minerals. By Section 11 of said Act it was authorized to construct, use and operate a railroad or railroads not exceeding ten miles in length, in said County of Luzerne.

The Nanticoke Coal and Iron Company was duly incorporated under and by virtue of an Act of the General Assembly of the State of Pennsylvania, duly passed and approved April 13, 1864, by which it was granted certain rights, powers and privileges, including the right to purchase, lease and hold coal land in the County of Luzerne, not exceeding at any one time 5,000 acres, with power to sell or lease the same and use the capital of said company in purchasing, mining, vending and transporting to market, coal and other minerals.

50 By General Acts of the General Assembly of the State of Pennsylvania, duly passed and approved May 16, 1861, and April 13, 1868, respectively, entitled "An Act Relating to Railroad Companies" and "An Act authorizing the Merger and Consolidation of Coal Companies," the aforesaid Steuben Coal Company and the aforesaid Granby Coal Company, were on June 1, 1868, duly merged and consolidated into the Nanticoke Coal and Iron Company, which was under and pursuant to the provision of said Acts duly vested with all the rights, powers, privileges and property of both the said companies, and of their constituent companies. The said General Act of April 13, 1868, authorized coal companies having coal lands or mining privileges in the Counties of Schuylkill and Luzerne, in the State of Pennsylvania, to merge and consolidate their corporate rights, powers, privileges, property and franchises into any other company owning real estate in either of said counties, "being a coal or mining company or a coal and iron company, or a company having mining privileges." Said Act also provided that such merger "to be made in accordance with the provisions of the Act of May 16, 1861, above referred to, and when so made, all the property, rights, franchises and privileges of the company so merged shall, by virtue of such merger, be thereby transferred to and vested in the company into which such merger shall be made." Under and by virtue of the provisions of the said Acts, the said Nanticoke Coal and Iron Company was duly consolidated and merged into the defendant, The Delaware, Lackawanna and Western Railroad Company, on or about June 23, 1870.

By an Act of the General Assembly of the State of Pennsyl-
51 vania, duly passed and approved March 22, 1855, certain powers, rights and privileges were conferred upon the defendant by the State of Pennsylvania, and it was by Section 4 of said Act duly authorized to "increase the quantity of their coal lands to an amount not exceeding (with those already acquired) 2,000 acres, and to hold said coal lands; and to mine, purchase, transport

and vend coal." By Section 5 of said Act the defendant was duly authorized to "make agreements and contracts with corporations and individuals in the State of New York and New Jersey, expedient and necessary in the prosecuting of their business in transporting and vending anthracite coal."

(Each of the parties may refer for greater certainty to the several Acts and agreements of merger hereinbefore mentioned and to each and every one of them.)

Mr. O'Brian: It is so stipulated.

Reese A. Phillips, recalled as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Jenney.

In addition to the mines which have been mentioned here The Delaware, Lackawanna and Western Railroad Company owns other coal mines, and very large quantities of undeveloped coal lands, adjacent to the mines that are in operation now. They are all in the State of Pennsylvania. The Delaware, Lackawanna and Western Railroad Company is the only railroad that reaches any of these collieries that are owned and operated by The Delaware, Lackawanna and Western Railroad Company, except the Manville Colliery. All of the collieries, except the Manville Colliery, average about 3 to 8 miles away from any other road. The Delaware, Lackawanna and Western Railroad Company does not own all of the collieries that its road touches but owns the great majority of all the collieries located along its line.

53

Charles C. Hubbell, called as a witness for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Jenney.

I am the Purchasing Agent of The Delaware, Lackawanna and Western Railroad Company.

The following testimony given by the witness Hubbell was admitted by the Court over the objection of the United States Attorney:

The amount of the purchase made by that Company for the operation of its coal mines yearly approximates two million dollars. Of these purchases about ninety per cent are transported in interstate commerce. In making purchases of material to be used in the mines, we ask for and get bids on the basis, f. o. b. destination, such as Scranton or the mines, and f. o. b. the point of delivery on our line of road. These bids almost invariably differ by the amount of the freight charges from point of delivery on our line to destination, so that if the stock were delivered f. o. b. line, the price would be less than f. o. b. mines, by the amount of the freight rate from the line point to the mines. If the commodity was purchased f. o. b. mines, then the seller would pay the freight over our road. If it was purchased f. o. b. line, we would carry it over our road without pay-

ment of the freight rate. There is no difference in dollars and cents to the Company which way we purchase.

Cross-examination by Mr. O'BRIAN:

"Q. Why would there not be a difference which way you bought? Is it not true that in one way you get your full freight rate paid you, and in the other way you carry simply at cost to yourself, without profit?

A. I don't think I understand that point.

Q. The large freight rate means more than the actual cost to you, it means a slight profit, does it not?

A. Yes, sir, I assume so.

Q. You do not carry hay free naturally from Buffalo, for any other operator in the coal business in the Scranton district, do you?

A. No, sir, I don't believe we do.

Q. So that if any other operator in the Scranton District wanted to buy hay at Buffalo, why, it would cost him the full freight rate to get it down there?

A. Yes, sir.

Q. But when you carry it—your buy it yourself and carry it yourself, the cost of transportation is considerably less than that freight rate, is it not?

A. Yes, sir.

Q. Certainly. So that it would make a difference, would it not?

A. Well, I don't think I understand your question, Mr. O'Brien. What I meant when I answered was that two bidders, one bidding f. o. b. line of road at Buffalo at $15.00 a ton, and another bidding f. o. b. Scranton $15.00 a ton, I would take the latter price."

Redirect examination by Mr. JENNEY:

Q. I did not quite understand what Mr. O'Brian asked you. As I understand you, Mr. Hartzell, whether you get bids f. o. b. line or f. o. b. mines it would not make any difference to the company, as I understand from your experience in getting bids, because the seller, if he sells stuff to you f. o. b. line, deducts the freight rate from the price at which he sells the goods to you?

A. Yes, sir.

Q. So that ultimately the company pays just the same in dollars and cents, whether he gets stuff f. o. b. line, freight rate being deducted, something deducted from the purchase price, where a man pays the freight, or it is taken to the mine, plus the freight rate, is that right?

A. Yes, sir, I don't think there is any question about it."

Recross-examination by Mr. O'BRIAN:

"Q. Well, in this particular case, why did your company, in buying this hay in Michigan, direct a local shipment to it at Buffalo? Why was it done in that way? When you bought the hay at Vassar, Michigan, for Scranton, Pa., why was not that hay consigned from Vassar, Mich., to Scranton, Pa., over the lines of the D. L. & W., if it did not make any difference?

A. I do not think I could answer that, Mr. O'Brian. I do not think there was the slightest idea to deceive or blind-bill it at all. It was a straightforward business proposition.

Q. Well, since you have given an opinion on that, how do you explain this: that when this was shipped from Michigan to Buffalo, a 17 cent rate was put on the way bill and presumably charged, and when it reached Buffalo the Lackawanna prorated that rate on the basis of a through rate to Scranton, so that as a matter of fact instead of 17 cents being paid, which showed on the way bill, only between 12 and 13 cents was paid; why was that done if it did not make any difference how it was transported? Can you explain that?

A. I cannot off-hand."

Defendant rests.

Mr. SEARS: I renew the motions, if your Honor please, made at the close of the Government's case.

The COURT: Denied.

Mr. SEARS: Exception.

Summing up waived by both sides.

Extracts from the Charge of the Court.

The Court in its charge to the jury said

* * * The thing which was transported, that is, the hay, must be owned by the railroad company which transports it. As you doubtless noticed, there is a difference of opinion on that subject, but for the present you will be guided by my opinion, which is that under this contract in writing, the railroad company did own the hay when it transported the hay from Buffalo to Scranton. Now, there is the second requisite, which on the evidence has plainly been fulfilled.

Then the Government must show, and must in its showing satisfy you beyond a reasonable doubt of the next thing, viz.: that that commodity—that hay—was not either necessary in the conduct of the Lackawanna's business as a common carrier, or that, if it was necessary in the conduct of that business as a common carrier, this particular hay was not intended for use in the conduct of said business as a common carrier.

Here we have arrived at a "contradiction of fact" but not in the sense of some other cases that we have tried since I have been here—viz: where one man went on the witness stand and said a thing is thus-and-so, and another man then went on the witness stand and said it is not thus-and-so, it is another way and the first man is a liar. That is a contradiction of fact, such as no human being can fail to understand. But here the question is not where this hay came from nor what it was intended for. That is all plain enough. It is for you, under the language of this Act and the form of this indictment, to say whether this hay was necessary for the conduct of the business of the Lackawanna Railroad as a common carrier; and there quite possibly men of equal intelligence may differ.

Let us consider for a moment what is the meaning of the word "necessary." I am not able to instruct you that the word necessary is a term of law, as the word larceny or murder or other technical expressions are terms of law. It is a word to be interpreted according to the evidence and the common sense of those who sit as judges on the question.

Take a very extreme example, which may be a little ab-
57 surd, but absurdity frequently illustrates truth. I normally take my own profession. If a lawyer buys a law book, he finds that law book necessary for the transaction of his business as a lawyer—but he cannot practice law, and no more can any other man transact business for any length of time without eating. But would it be said that the moment that lawyer eats his dinner, that the dinner is necessary for the practice of his legal profession? Now, that is an extreme and rather absurd illustration,—it may be applied to any other business, yet it shows the difference, in the meanings of the word necessary. * * *

I advise you gentlemen as a matter of law this far, viz: the use of coal on a railroad is something that is necessary within the meaning of this statute for the conduct of the business of that railroad as a common carrier. I think that is perfectly plain; anybody can see it. But, first, would you regard hay for mules and horses as so necessary in the production of coal as to render the hay itself necessary in the conduct of the business of the Lackawanna Railroad as a common carrier? If it is not necessary, why then, they had no right to carry it. Second, even if you regard hay for horses and mules as so necessary as to render it proper to be carried at all the coal that was turned out was for the use of the railroad, was it necessary when so much of the coal product as was used by the railroad directly for the propulsion of its engines and the like constituted from twenty-five to thirty per cent only of the entire output?

This being in form at all events, a criminal case, though the penalty is a fine only, it is incumbent upon the Government to satisfy
58 you of these points beyond a reasonable doubt, and what that means I have already had occasion to mention to every man in this panel and I shall not repeat it. If you are of opinion, first, that hay is not necessary in the conduct of the business of the Lackawanna Railroad as a common carrier, under this evidence, then you will find a verdict for the Government, and that verdict will be guilty. If you are not satisfied beyond a reasonable doubt of the unnecessity of this hay under these circumstances, then you will find a verdict for the defendant, and that verdict will be not guilty. But if you conclude that hay under some circumstances may be necessary, yet if you are convinced beyond a reasonable doubt that this hay under the circumstances of this kind of coal mining is not necessary in the conduct of the business of the Lackawanna Railroad as a common carrier, then you are authorized to find a verdict of guilty, and if you are not so satisfied beyond a reasonable doubt, you should find a verdict of not guilty.

MR. SEARS. If your Honor pleases, I except to so much of your Honor's charge as charged in substance that the hay in question was

owned by the defendant during the interstate transportation; and I also except to so much of your Honor's charge as leaves it a question for the jury to determine whether or not hay for mules in a mine is necessary for the production of coal.

The COURT: I have not charged that.

Mr. SEARS: I so understood you.

The COURT: What I have charged is that it is for them to
59 say whether hay for mules and horses is a necessity in the sense of the statute, for the conduct of the business for the Lackawanna Railroad as a common carrier. Of course you very probably interpret that as being equal to what you just said.

Mr. SEARS: I did so interpret it, your Honor.

The COURT: I repeat just what I have said and grant you an exception.

Mr. SEARS: It is that part of the charge I wish to except to, your Honor."

The jury then retired with instructions to seal its verdict. Court adjourned to March 19th, 1912, at 10:00 o'clock A. M.

60 MARCH 19TH, 1912.

The jury returned with a sealed verdict of Guilty.

Mr. SEARS: I move that judgment be arrested on the ground that the statute under which this indictment was found, as applied to the facts in this case, is unconstitutional for the reasons which were stated in the motion made at the close of the Government's case; and also on the ground that the evidence is insufficient to warrant a verdict.

The COURT: Motion is denied.

Mr. SEARS: To each of these denials I except.

The Court thereupon proceeded to pass judgment, and sentenced defendant to pay a fine of One Hundred Dollars on each count, making a total of Two Thousand Dollars.

The foregoing Bill of Exceptions contains all the evidence given on the trial of this case. And that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this case and prays that the same may be settled and allowed and signed and certified by the Judge as provided by law.

Dated, May —, 1912.

WILLIAM S. JENNEY,
Attorneys for Defendant.

The foregoing Bill of Exceptions is consented to.

JOHN LORD O'BRIAN,
United States Attorney for the
Western District of New York.

61 Settled and allowed this 10 day of May One thousand nine hundred and twelve.

C. M. HOUGH,
United States District Judge.

(Endorsed:) No. 821. District Court of United States Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Bill of Exceptions. Filed May 11, 1912. S. W. Petrie, Clerk.

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Exhibit 1.

This agreement made this 21st day of August, 1909, by and between Vassar Hay and Produce Company a corporation of the State of Michigan hereinafter called the Vendor, party of the first part and the Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania hereinafter called the Purchaser, party of the second part.

Witnesseth, That the parties hereto for and in consideration of the agreement hereinafter to be kept and performed by the respective parties do hereby agree to and with each other as follows:

First. The Vendor agrees to sell and deliver to the purchaser, f. o. b. on the tracks of the Delaware, Lackawanna & Western Railroad Company, at Buffalo, N. Y., 3,000 tons (of 2,000 lbs. each) of No. 1 timothy hay of the standard required by the National Association, in bales, in terms and agreements of the provision hereinafter set forth.

Second. The Vendor agrees to deliver said hay in monthly installments of the number of tons as shown hereunder until the whole quantity shall be delivered.

September,	1909	300	tons.
October,	"	300	"
November,	"	350	"
December,	"	350	"
January,	1910	400	"
February,	"	400	"
March,	"	400	"
April,	"	300	"
May,	"	200	"

63 The installments for each month need not be delivered in one shipment, but failure on the part of the Vendor to deliver the quantity herein called for in any month may at the purchaser's option be treated as a breach of this agreement and the purchaser may decline to receive and pay for any future shipments. The failure on the part of the purchaser to exercise said option in the event of a shortage in the quantity of hay delivered in any one month shall not be deemed a waiver of its rights to exercise said option in the event of a shortage in the quantity of hay delivered in any subsequent month.

Every carload of hay delivered herein shall contain at least ten tons of hay and the purchaser may refuse to receive and pay for any carload tendered to it containing less than ten tons of hay. The failure on the part of the purchaser to reject any carload of hay tendered to it containing less than ten tons of hay shall not be deemed

a waiver of its right to reject and refuse to pay for any carload of hay containing less than ten tons subsequently tendered it. The weight of each shipment of hay shall be determined by the purchaser at the delivering point and as so determined by the purchaser shall be conclusive and binding upon the parties hereto and all payments shall be based thereon.

Third. The Purchaser agrees to pay to the Vendor for all hay delivered to it hereunder as hereinbefore provided, fifteen dollars and forty cents per ton, f. o. b. Buffalo, N. Y. Payment for the hay shall be made as follows, viz: Upon the delivery of the hay to the purchaser at Buffalo, N. Y., the same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser at which places the purchaser shall have the right to inspect such hay before acceptance and if upon such inspection said hay shall prove to be the kind and *quantity* hereinbefore
64 specified and shall conform in all respects to the requirements of this contract, the purchaser shall accept such hay and pay for the same within thirty days after such acceptance.

Fourth. The Vendor expressly warrants that all the hay to be sold and delivered by it under this agreement shall be No. 1 timothy hay of the standard required by the National Association. The purchaser may refuse to receive and pay for any hay which shall prove upon inspection made as hereinbefore provided, not to be of such standard or to receive and pay for the shipment of which such hay shall form a part without subjecting itself to any liability therefor. In such an event the purchaser may request the Vendor to forward an equal quantity of No. 1 timothy hay of the required standard to replace that so rejected and if the Vendor shall fail so to do then the purchaser shall have the right to buy in the open market and to charge the Vendor with the difference between the amount herein agreed to be paid for such hay and the amount actually paid for hay in the open market which difference the vendor agrees to pay to the purchaser, and the purchaser shall have the right to deduct the amount of such difference from the contract price or from the next instalment becoming due hereunder. If however the purchaser shall desire to accept such hay of an inferior standard it shall have the right at its option so to do in each event the purchaser shall have the right to deduct from the price fixed herein the difference between the market price of No. 1 timothy hay of the required standard and of such inferior hay at the time and place of delivery. The acceptance of such inferior hay by the purchaser and payment therefor on the basis hereinbefore set forth however shall not in any way relieve the Vendor of its obligations hereunder in respect to the quantity of all other hay to be delivered by it here-
65 under nor be deemed a waiver on the part of the purchaser of its right to require all other hay delivered by the Vendor hereunder to be No. 1 timothy hay of the standard hereinbefore specified.

Fifth. It is expressly agreed by the parties hereto that this agreement is and shall be indivisible and a failure by the Vendor to deliver in any month the quantity of hay herein required to be de-

livered in said month may at the purchaser's option be treated as a breach of the entire agreement which will absolve the purchaser from any further liability hereunder. The purchaser may however in such event at its option continue to treat the contract as operative and may require the Vendor to at once furnish enough of No. 1 timothy hay of the required standard to supply the deficiency for said month, and if the Vendor shall fail so to do then the purchaser may buy in the open market the required quantity of hay of the grade or standard called for herein and charge the Vendor with difference between the agreed price and the price actually paid for such hay bought in the open market which difference the Vendor agrees to pay to the purchaser and the purchaser shall have the right to deduct the amount of such difference from the contract price or from any installments thereof hereafter becoming due hereunder.

Sixth. The Vendor agrees that for all hay refused by the purchaser hereunder because of poor quality thereof or because of the absence of the full ten tons of hay in any carload or for any other reason for which the Vendor shall be responsible, it will pay demurrage, freight and other charges which shall accrue thereon. The Vendor also agrees to pay demurrage charges which may accrue on any hay delivered by it hereunder by reason of any controversy which may arise between it and the purchaser by reason of the quality or quantity of said hay or place of delivery or for any reason for which the vendor may be responsible.

66 Seven. The Vendor agrees to indemnify and save harmless the purchaser from any and all loss or damage of any and every name and nature caused by or arising out of any failure by the Vendor to perform the whole or any part of this agreement.

Eight. The Vendor agrees to furnish and deliver to the purchaser upon the execution of this agreement a good and sufficient surety bond satisfactory to the purchaser in the sum of ten thousand dollars ($10,000.00), conditioned upon the Vedor well and truly keeping and performing each and every agreement covenant and condition in this contract contained on its part to be kept and performed.

Ninth. Purchaser agrees to furnish Vendor cars; in the case of a car famine should Vendor be unable to procure cars from any source then Vendor shall not be liable for any default caused thereby.

In witness whereof the parties hereto have caused this agreement to be executed the day and year first above written.

VASSAR HAY AND PRODUCE COMPANY.

By F. M. GREENOUGH, *Manager.*

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

By E. E. LOOMIS,
S. D.,
Vice-Pres't.

Form approved by
W. S. JENNY,
Gen'l Counsel.

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Exhibit 2.

The Delaware, Lackawanna & Western R. R. Co.

No. 189,472. New York, *Oct.* 2, 1909.

National City Bank, Pay Order of Vassar Hay & Produce Co., Twenty-nine hundred & seventy-nine 04 100 Dollars. $2,979.04.

A. D. CHAMBERS, *Treasurer.*

Countersigned by
JAMES J. FARLEY, *Cashier.*

(Endorsed:) Vassar Hay & Produce Co. By F. M. Greenough, Manager Per A. O. G. Pay to the Order of First National Bank, of Detroit, Mich. Bank of Vassar, Vassar, Mich. Frank North, Cashier. Endorsement Guaranteed. Received Payment through the New York Clearing House Oct. 6, 1909. Mail Teller Endorsements Guaranteed Nat. Bank of Commerce in New York. Pay National Bank of Commerce, New York, N. Y., or Order. All Prior Endorsements Guaranteed First National Bank, Detroit, Mich. Frank G. Smith, Cashier.

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Form G. A. 2-A.

7-04-5M.

The Delaware, Lackawanna & Western Railroad Company to Vassar Hay & Produce Co., Dr.

R.

Address Vassar, Mich.

Sept. 21, 1909.

9 23 09. P.
For Hay purchased as follows:—

			Cars.		
9 1 09.	R. A. P.		7585.....	211.02	
			Less Frt	46.20	
					164.82
"	"		7709.....	167.94	
			Less Frt	37.84	
					130.10
"	"		3803.....	189.61	
			Less Frt	28.32	
					161.29
"	"		18637.....	224.46	
			Less Frt	47.41	
					177.05
"	"		51355.....	205.67	
			Less Frt	47.41	
					158.26

"	"	53488.....	160.74		
		Less Fr't	26.27		
				134.47	
"	"	42151.....	168.17		
		Less Fr't	30.14		
				138.03	
"	"	8180.....	208.05		
		Less Fr't	37.32		
				170.73	
"	"	36892.....	213.32		
		Less Fr't	29.41		
				183.91	
2	"	30906.....	197.77		
		Less Fr't	30.68		
				167.09	
"	"	62462.....	199.62		
		Less Fr't	26.27		
				173.35	
"	"	30257.....	187.23		
		Less Fr't	29.81		
				157.42	
4	"	18094.....	205.16		
		Less Fr't	31.80		
				173.36	
"	"	69949.....	143.11		
		Less Fr't	24.84		
				118.27	
"	"	6550.....	191.50		
		Less Fr't	44.28		
				147.22	
6	"	66099.....	185.49		
		Less Fr't	29.05		
				156.44	
7	"	69258.....	156.12		
		Less Fr't	24.84		
				131.28	
"	"	5486.....	191.77		
		Less Fr't	29.38		
				162.39	
"	"	12320.....	199.82		
		Less Fr't	26.26		
				173.56	
					$2,979.04

R.

Charge Coal M. Dept., $2,979.04.

Audit No. 264,958.
Correct:
G. F. WILSON,
Treasurer D. L. & W. R. R. Co.

Paid Oct. 2, 1909.

Approved:

——— ———,

General Auditor.

Audited:

——— ———.

Approved:

W. H. TRUESDALE, *President.*

Received of The Delaware, Lackawanna & Western Railroad Company, Two Thousand, Nine Hundred Seventy-nine and 04 100 dollars, in full of above account.

Dated Oct. 5, '09.

VASSAR HAY & PRODUCE CO.,
By F. M. GREENOUGH, *Manager.*

[Endorsed:] Cash Book Page 17. The Delaware, Lackawanna & Western Railroad Co. Receipt of Vassar Hay & Produce Co. Audit No. 264,958. Amount $2,979.04. Month of September, 1909. Charge to account of ———.

(Here follows waybill marked page 69.)